

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ "ए" अहमदाबाद।
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI WASEEM AHMED, ACCOUNTANT MEMBER

ITA Nos. 1708/Ahd/2011 & 1169/Ahd/2013
Assessment Year : 2009-10

M/s. Ashishkumar Ankitkumar & Co., 2948, Ambli Pole, Zaveriwad, Ratanpole, Ahmedabad-380001 [PAN: AAPFA 6975 R]	Vs	Asstt. Commissioner of Income-tax, Central Circle 2(2), Ahmedabad
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
Assessee by :		Shri Tushar Hemani, AR
Revenue by :		Shri Deelip Kumar, Sr DR

सुनवाई की तारीख/Date of Hearing : 23/01/2020
घोषणा की तारीख /Date of Pronouncement: 13/02/2020

आदेश/O R D E R

PER RAJPAL YADAV, VICE PRESIDENT :-

The present two appeals are directed at the instance of the assessee against two separate orders of the learned CIT(A)-III, Ahmedabad dated 18.04.2011 and 18.02.2013 passed for Assessment Year 2009-10. ITA No.1708/Ahd/2011 emerges out of proceedings under Section 143(3) of the Income-tax Act, 1961 (hereinafter referred to as "the Act"); whereas ITA No.1169/Ahd/2013 arose against penalty imposed under Section 271AAA of the Act.

2. First, we take up ITA No. 1708/Ahd/2011. The grounds of appeal taken by the assessee are not in consonance with Rule 8 of Income Tax (Appellate Tribunal) Rules, 1963; they are descriptive and argumentative in nature. In brief, the grievance of the assessee is that learned CIT(A) has erred in confirming the addition of Rs.18,20,407/-.

3. The brief facts of the case are that a survey under Section 133A of the Income-tax Act was carried out at the business premises of M/s. Ashish Kumar Ankit Kumar & Co., situated at 1st Floor, 311, Kucha Ghasi Ram, Fateh Puri, Chandani Chowk, Delhi. During the course of survey, a sum of Rs.27.57 lakhs was recovered from the business premises. As the assessee was unable to explain the cash found/recovered; therefore, the survey was converted into search under Section 132(1) of the Act. It emerges out from the record that initially the assessee took the stand that this sum of Rs.27.57 lakhs was of some clients who have given to the assessee for Angadiya services. Later on, the assessee changed the stand and offered it as a commission income. The Assessing Officer, apart from this, further estimated commission income of Rs.25 lakhs and determined the taxable income of the assessee at Rs.53,89,840/-.

4. On appeal, learned CIT(A) partly upheld the order of the Assessing Officer. The findings of the learned CIT(A) read as under:-

"5. I do not agree fully with the AR of the appellant. For the purpose of working out the daily turnover, monthly turnover or the turnover for 207 days as shown in the above mentioned table, the appellant has included the seized cash is amount of Rs. 27.50 Lacs as the commission income. This is not correct. When the partner of the appellant was asked to state as to which party the cash of Rs. 27.50 Lacs belonged to, he could not state their names. Even subsequently the name of the concerned parties was not given by the appellant as it would have adversely affected the business of the appellant. Therefore, the appellant owned up the cash belonging to its clients and agreed to pay the taxes thereon in order to buy the peace of mind. The amount of Rs.27.50 Lacs cannot be therefore treated as the commission income of the appellant. If this amount is excluded, then the turnover of the appellant on the basis of the seized documents can be worked out as under:

It may be mentioned that during the course of search some documents were found which indicated the total turnover of the appellant for three dates namely on 2/12/2008 total turnover of Rs. 20,69,950/-, on 3/12/2008 total turnover Rs. 61,56,350/- and on 4/12/2008 total turnover of Rs. 43,35,460/-. In other words, the average turnover for the three days was Rs.41,87,253/-. If

this figure is taken as the average turnover for 207 days, then the total turnover during this period comes to Rs.86,67,61,440/-. If the rate of commission is taken at rupees 200 per lakh then the commission income of the appellant for 207 days comes to Rs. 17,33,522/- and if the commission income of Rs.300 per lakh is considered, then the total commission income of the appellant comes to Rs. 26,00,284/-. It may be mentioned that one of the partner of the appellant had admitted the commission income of Rs. 25 Lacs in the statement recorded after the date of search. In other words, the appellant was charging commission between Rs. 200 to Rs. 300 per lakh. In other words, the statement given by the partner of the appellant was based on the actual commission income earned by the appellant upto that date and therefore, there were no valid reason for retracting this statement by the partners. In other words, the appellant has earned gross commission income of Rs. 25 Lacs during 207 days as mentioned above.

5.1 In the profit and loss account, the appellant has debited total expenditures of Rs. 6,79,593/-. Therefore, the addition of Rs. 25 Lacs minus Rs. 6,79,593/- = Rs. 18,20,407/- is upheld as the net commission income of the appellant instead of Rs. 25 Lacs considered by the AO."

5. Learned Counsel for the assessee, at the very outset, contended that though Rs. 27.50 lakhs was not initially admitted by the assessee as commission income; but later on it was considered as a commission income and offered for taxation. There is no justifiable reason at the end of the learned CIT(A) to exclude this amount from the total income of the assessee representing commission income. The learned CIT(A) has determined Rs.25 lakhs as estimated commission income; thereafter debited the expenditure and confirmed addition of Rs.18,20,407/-, but set off of Rs.27.50 lakhs disclosed by the assessee has not been given. On the other hand, learned Departmental Representative contended that the amount of Rs.27.50 lakhs is a separate amount and it cannot be treated as commission income.

6. We have duly considered the rival contentions and gone through the record carefully. A perusal of the order of learned CIT(A) would indicate that learned First Appellate Authority has estimated the commission income of the assessee for 207 days. The working of 207 days has been

taken by the learned CIT(A) from the day when the assessee-firm came into existence by execution of the partnership deed. It came into existence on 7th May 2008 and ended on 4th December 2008. The average turnover which has been worked out by the learned CIT(A) is based on the turnover of three days, i.e. immediately prior to the survey. To our mind, the commission income of the assessee was to be estimated for the period during which the firm remained in existence for the relevant accounting year, i.e. for the number of days relating to Assessment Year 2009-10 it remained into existence. Its existence has been worked out for 207 days. Once, after taking into consideration the turnover, the commission income has been worked out at a sum of Rs.25 lakhs, then how the commission income already accounted for by the firm at Rs.27.50 lakhs could not be set off. We could appreciate the case of the Revenue, if after taking into the average commission income for three days, the learned CIT(A) worked out the commission income of 207 days at Rs.27.50 lakhs plus Rs.25 lakhs. In that situation, the stand of the Revenue not to give set off of Rs.27.50 lakhs could be justified. But in the present situation, the only method which could be adopted is to work out total commission income for 207 days by whatever method, then debit that commission income from the amount already disclosed by the assessee plus expenditure and the remaining will be taxable. The disclosure made by the assessee at Rs.27.50 lakhs is more the ultimate estimated income worked out by the learned CIT(A); therefore, no further addition is required. Accordingly, the addition of Rs.18,20,407/- is deleted and the appeal of the assessee is partly allowed.

7. Now we take up ITA No. 1169/Ahd/2013. This appeal of the assessee is directed against the order of the learned CIT(A)-III, Ahmedabad dated 18.02.2013 for Assessment Year 2009-10.

8. The solitary grievance of the assessee is that learned CIT(A) has erred in confirming the penalty of Rs.4,57,041/- which was imposed by the Assessing Officer under Section 271AAA(2)(ii) of the Act.

9. The penalty under Section 271AAA(2)(ii) has been imposed *qua* the addition of Rs.27,50,000/- and Rs.18,20,407/-. In other words, the total amount considered for computing the penalty is Rs.45,70,407/- and 10% of this amount has been calculated as penalty imposable upon the assessee under Section 271AAA of the Act. In this way, learned Assessing Officer has imposed the penalty of Rs.4,57,041/-. Appeal to the learned CIT(A) did not bring any relief to the assessee.

10. With the assistance of the learned representatives, we have gone through the record carefully. Section 271AAA has a direct bearing on the controversy; therefore, it is pertinent to take note of this section which reads as under:-

“271AAA. (1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of June, 2007 but before the 1st day of July, 2012, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him, a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year.

(2) Nothing contained in sub-section (1) shall apply if the assessee, –

(i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;

(ii) substantiates the manner in which the undisclosed income was derived; and

(iii) pays the tax, together with interest, if any, in respect of the undisclosed income.

(3) No penalty under the provisions of clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1).

(4) *The provisions of sections 274 and 275 shall, so far as may be, apply in relation to the penalty referred to in this section.*

Explanation. – For the purposes of this section, –

(a) "undisclosed income" means –

(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has –

(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or

(B) otherwise not been disclosed to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner before the date of search; or

(ii) any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted;

(b) "specified previous year" means the previous year –

(i) which has ended before the date of search, but the date of filing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the said date; or

(ii) in which search was conducted."

11. A perusal of sub-section (2) of section 271AAA would indicate that an assessee could be absolved from the levy of penalty if the conditions enumerated in sub-section (2) are being fulfilled by the assessee. The conditions enumerated in sub-section (2) are that penalty under Section 271AAA would not be leviable upon assessee if the assessee, during the course of search, has admitted the undisclosed income; specified the manner in which such income has been derived; substantiated the manner in which the undisclosed income was derived and paid the taxes together with interest, if any, in respect of the undisclosed income. As submitted by the assessee, it has not firstly admitted the cash recovered during the course

of search at Rs.27.50 lakhs. Therefore, it does not fulfill the conditions enumerated in sub-section (2) of Section 271AAA of the Act. Even copy of the statement recorded under Section 132(4) has not been placed before us. Therefore, after going through the record, we are of the view that the assessee failed to fulfill the conditions of Section 271AAA. It, therefore, deserves to be visited with penalty. However, the penalty is to be restricted *qua* 10% of the additions we have confirmed. In other words, the penalty was calculated on the following amounts:-

1.	Undisclosed income offered for tax in return of income filed in respect to notice u/s 153A	Rs.27,50,000
2.	Undisclosed commission income as confirmed by CIT(A) vide No.CIT(A)-III/258 /ACIT-CC-2(2)/10-11 dtd 18/04/2011	Rs.18,20,407
	Undisclosed income within the meaning of Explanation (a) to section 271AAA	Rs.45,70,407

We have already deleted Rs.18,20,407/-; therefore, 10% of this is to be excluded. The penalty is, therefore, restricted to Rs.2,75,000/-, instead of Rs.4,57,041/- imposed by the Assessing Officer. In the result, the appeal of the assessee is partly allowed.

12. In the result, both the appeals of the assessee are partly allowed.

Order pronounced in the Court on 13th February 2020 at Ahmedabad.

Sd/-

Sd/-

(WASEEM AHMED)
ACCOUNTANT MEMBER

(RAJPAL YADAV)
VICE PRESIDENT

Ahmedabad, Dated 13/02/2020

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आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीय प्रतिनिधि,आयकर अपीलीय अधिकरण ,राजकोट/DR,ITAT, Ahmedabad,
6. गार्ड फाईल /Guard file.

आदेशानुसार/ BY ORDER,

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सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण
ITAT, Ahmedabad